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No. 78-324

In the Supreme Court of the United States

OCTOBER TERM, 1978

FRANK PIERORAZIO and JESSE CAPPS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 578 F.2d 48.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 1978 (Pet. App. A10-A11). A petition for rehearing was denied on June 27, 1978 (Pet. App. A16-A17). Mr. Justice Brennan extended the

time for filing a petition for a writ of certiorari to and including August 26, 1978, and the petition was filed on August 25, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioners' conspiracy convictions.

2. Whether 21 U.S.C. 843(b) applies to the use of a telephone to facilitate an attempt or a conspiracy to distribute controlled substances.

3. Whether the affidavit in support of the application for an order authorizing a wire interception was insufficient because it incorporated by reference a prior affidavit of another government agent involved in the investigation.

4. Whether the application for the order authorizing the wire interception sufficiently established that other investigative methods were inadequate or unlikely to succeed.

5. Whether the tapes of the monitored conversations should have been excluded on grounds of failure of the government to present them for immediate sealing as required by 18 U.S.C. 2518(8)(a).

6. Whether the prosecutor's reference in his opening statement to the anticipated testimony of a witness who later refused to testify requires reversal of petitioners' convictions.

STATEMENT

Following a second jury trial [1] in the United States District Court for the Eastern District of Pennsylvania, both petitioners were convicted of conspiring to distribute a controlled substance, methamphetamine, in violation of 21 U.S.C. 846. In addition, petitioner Pierorazio was convicted on two counts of using a communication facility (a telephone) to facilitate the distribution and attempted distribution of controlled substances, in violation of 21 U.S.C. 843(b). On the conspiracy count, petitioner Pierorazio was sentenced to three and one-half years' imprisonment to be followed by two years' special parole, and petitioner Capps was sentenced to two years' imprisonment and two years' special parole. On the two Section 843(b) counts, Pierorazio received sentences of three and one-half years' imprisonment, both to be served concurrently with his sentence on the conspiracy count. The court of appeals affirmed (Pet. App. A1-A9).

On June 1, 1976, based upon a finding that probable cause existed to believe that petitioner Pierorazio was using a telephone at 31 East Wildey Street in Philadelphia in conspiring to distribute methamphetamine, the district court authorized agents of the Drug Enforcement Administration (DEA) to monitor conversations on that telephone (A. 11a-12a).[2] It was

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[1] The jury could not reach a verdict after the first trial (Pet. App. A2).

[2] "A." refers to the appendix filed by petitioners in the court of appeals. We are lodging a copy of this appendix with the Clerk of this Court.

soon discovered that through the use of a switching service provided by the telephone company that great majority of the calls coming into the East Wildey Street telephone were being diverted to Pierorazio's home telephone on Tulip Street in Philadelphia (A. 82a-83a). Once transferred, these conversations could not be monitored by the agents conducting the interception of the East Wildey Street telephone (*ibid.*). Consequently, a second interception authorization was obtained to permit the monitoring of the telephone at Pierorazio's residence (A. 65a-68a).

In these conversations, which were generally conducted in the guarded idiom of the drug trade,[3] Pierorazio and Capps discussed their methamphetamine distribution operation, and Pierorazio made numerous arrangements to buy, sell, and trade methamphetamine (A. 967a-1023a).

ARGUMENT

1. Petitioners contend that the evidence was insufficient to establish that the object of their conspiracy was to distribute methamphetamine, as charged in the indictment, rather than some other substance (Pet. 15-17).

[3] The government presented the expert testimony of DEA Special Agent Ellis M. Hershowitz to explain to the jury the meaning of some of the drug terminology used in the conversations.

This contention is without merit. Although no methamphetamine was seized from petitioners during the course of the conspiracy, it is settled that a drug distribution conspiracy may be proved even though the government has not actually seized the drugs involved. *United States* v. *Quesada*, 512 F.2d 1043 (5th Cir.), cert. denied, 423 U.S. 946 (1975). Indeed, a conspiracy may exist even if the participants do not succeed in their goal to obtain and distribute controlled substances. See *United States* v. *Mitchell*, 556 F.2d 371 (6th Cir. 1977).

Petitioners' monitored conversations introduced at trial contained ample proof that they were engaged in the distribution of methamphetamine, rather than any other controlled substance. In the conversations, the quantity of the drug to be delivered is frequently referred to in terms of "lines" or "T's", and while the term "line" is used in connection with either methamphetamine or cocaine, the evidence established that the term "T" (originally meaning a level teaspoon) is normally used to refer to methamphetamine alone (Tr. 322-323, 387, 450).[4] Moreover, the government expert testified that the term "meth" (used by a customer in referring to Pierorazio's product) is never used to refer to anything but meth-

[4] The fact that the substance involved was methamphetamine, rather than cocaine, is also shown by a conversation in which Pierorazio and his caller contrasted "Big C", or cocaine, which was readily available around town with "the regular stuff" that Pierorazio could not then provide (Tr. 333; A. 975a-976a).

amphetamine (Tr. 403-404; A. 1006a). Accordingly, the court of appeals properly rejected petitioners' claim of insufficiency in the evidence (Pet. App. A8). This factual determination does not merit further review. See *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967); *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949).[5]

2. Pierorazio also asserts that his convictions on two counts of violating 21 U.S.C. 843(b)—which proscribes the use of a communications facility (here, a telephone) in facilitating the commission of certain narcotics felonies—must be reversed because the evidence was insufficient to show that the specific distributions discussed over the telephone were in fact consummated (Pet. 12-15).[6] We do not agree that the evidence is insufficient to show that the operation involved the actual distribution of methamphetamine, and the court of appeals did not so hold (Pet. App. A3).

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[5] Petitioners' claim (Pet. 16-17) that the decision below conflicts with *United States* v. *Cooper*, 567 F.2d 252 (3d Cir. 1977), is incorrect. *Cooper* involves the application of the rule that once a conspiracy has been shown to exist, only slight evidence of a defendant's participation may suffice to establish his complicity in the conspiracy beyond a reasonable doubt. Petitioners suggest only that the commodity they were distributing was not proven; they do not deny that their participation in the scheme was sufficiently established by the intercepted calls revealing their central position in the conspiracy. Consequently, this case does not involve the "slight evidence" rule.

[6] The sentences on these convictions were concurrent with the sentence on the conspiracy count, which is unaffected by this claim.

The contention is, in any event, without merit. Section 843(b) prohibits the use of the telephone in facilitating inchoate crimes like attempts and conspiracies as well as consummated offenses. It is not significant that 18 U.S.C. (1964 ed.) 1403(a) (70 Stat. 573), the predecessor of Section 843(b), referred specifically to attempts and conspiracies, while Section 843(b) does not. As the court below explained (Pet. App. A6-A7; emphasis in original; footnotes omitted):

> Section 843(b) makes criminal the use of a telephone "in committing, or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter [subchapter I] or subchapter II of this chapter [Chapter 13 of Title 21]." Included within subchapter I is § 846, which makes it a felony for a person to *attempt* or *conspire* to commit any offense defined in subchapter I (such as distribution or possession with intent to distribute, defined as offenses in § 841). In other words, *attempt to distribute* a controlled substance, *conspiracy to distribute* a controlled substance, *attempt to possess* a controlled substance with intent to distribute it, and *conspiracy to possess* a controlled substance with intent to distribute it, are all felonies under provisions of subchapter I. As such, they are plainly included within the terms of § 843(b). We can discern nothing in the legislative history, nor has any policy been advanced, which would call for a different result. Hence, the fact that particular language found in former § 1403(a) was there-

after omitted from § 843(b) does not persuade us that Congress intended to preclude a § 843 (b) facilitation conviction where the underlying felony is attempt or conspiracy under § 846.

This interpretation of Section 843(b) is in accord with the analysis of all other courts of appeals that have considered this question. See *United States* v. *Losing*, 560 F.2d 906, 913 (8th Cir.), cert. denied, 434 U.S. 969 (1977); *United States* v. *Rodriguez*, 546 F.2d 302, 307-308 (9th Cir. 1976); *United States* v. *Steinberg*, 525 F.2d 1126, 1133 (2d Cir. 1975), cert. denied, 425 U.S. 971 (1976); see also *United States* v. *Kirk*, 534 F.2d 1262 (8th Cir. 1976), cert. denied, 430 U.S. 906 (1977); *United States* v. *Sisca*, 503 F.2d 1337 (2d Cir.), cert. denied, 419 U.S. 1008 (1974).[7]

3. Petitioners argue that their monitored conversations should have been suppressed because an affidavit in support of a wire interception application may not incorporate by reference a prior affidavit by another law enforcement officer, and, absent recourse to this earlier affidavit, the application for the second interception order in this case failed to set forth facts establishing probable cause (Pet. 17-19).

It is well established that "[o]bservations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number." *United States* v. *Ventresca*, 380 U.S. 102, 111 (1965). Accordingly,

[7] As petitioners note (Pet. 14), the court of appeals in this case rejected the contrary conclusions of two district courts in its own circuit (Pet. App. A5-A6). That rejection does not establish a conflict warranting review by this Court.

it was perfectly proper for Agent Fekete of the DEA, the affiant supporting the application for the interception at Pierorazio's residence, to rely on the information provided by a fellow agent in the affidavit filed in support of the prior East Wildey Street interception. See *United States* v. *McCoy*, 478 F.2d 176 (10th Cir. 1973). The fact that Agent Fekete, in addition to summarizing new evidence obtained in the investigation, simply incorporated by reference the prior affidavit rather than setting out its entire content afresh, is immaterial. See *United States* v. *Landmesser*, 553 F.2d 17, 21 (6th Cir. 1977).[8]

[8] Petitioners also suggest (Pet. 17-18) that the second affidavit contained material misrepresentations. Agent Fekete did state at the suppression hearing that a subsequent review of the tapes of the original intercept led him to alter his analysis of the two conversations described in the affidavit to some extent (Tr. 140-145, 147-148; A. 221a-226a, 228a-229a). It is not clear that this re-evaluation would deprive the conversations of the significance attributed to them in the affidavit. Compare Tr. 27-28, A. 183a-184a and Tr. 144, A. 225a with Tr. 148-149, A. 229a-230a (the first conversation); compare Tr. 162, A. 243a with Tr. 152-153, A. 233a-234a (the second conversation). In any event, the entirely accurate statement in the affidavit that the calls on the originally intercepted telephone were being automatically transferred to the telephone for which interception authority was sought was sufficient, with the original affidavit that was incorporated by reference, to constitute probable cause for the issuance of the second authorization. The two additional calls reported were thus not necessary to the sufficiency of the affidavit. There is no indication that the inaccuracies in the affidavit were the result of deliberate falsehood or a reckless disregard for the truth. Accordingly, under *Franks* v. *Delaware*, No. 77-5176 (June 26, 1978), petitioners were not even entitled to a hearing on their claim that the warrant contained misrepresentations. They

4. Petitioners next contend that the applications for electronic surveillance did not satisfy the requirements of 18 U.S.C. 2518(1)(c) because they did not explain whether "other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."

The record refutes this claim. The affidavits reveal a history of physical surveillance of Pierorazio and his associates, utilization of a number of informants, and analysis of telephone toll records. While these conventional methods had succeeded in disclosing that Pierorazio and others were dealing in controlled substances, they had failed to reveal the entire scope of the conspiracy or produce sufficient evidence for a successful prosecution. The affidavits pointed out why these methods were unsuccessful: The confidential informants and witnesses described in the affidavit had refused to testify in court (A. 41a); infiltration by undercover agents was not possible because Pierorazio dealt only with close associates (*ibid.*); and the execution of search warrants would not identify Pierorazio's co-conspirators or sources of supply (*ibid.*). The affidavits further informed the court that the conspirators were alert to the possibility of surveillance (citing at least one instance of overt counter-surveillance activity (A. 84a)), and pointed out that, in any event, continued visual surveillance would not disclose direct evidence of the drug deal-

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nevertheless were permitted to explore this matter fully at the hearing on the motion to suppress, and the district court concluded that their attack on the affidavit was without merit.

ings conducted inside the premises (A. 41a, 84a-85a).[9]

Petitioners assert (Pet. 20-22) that the circuits have adopted different standards for determining compliance with 18 U.S.C. 2518(1)(c). Whether or not this is true at the present time, the affidavits involved here, which contain detailed factual allegations concerning the alternative techniques attempted and why they were unsuccessful in this particular case, are clearly sufficient to meet the most stringent interpretation of Section 2518(1)(c). Accordingly, even assuming there is some difference in the standards used, this case does not directly present that issue.[10]

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[9] Relying on *Calhoun* v. *State*, 34 Md. App. 365, 367 A.2d 40 (Ct. Spec. App. 1977), petitioners also make the argument that because a prior affidavit was incorporated by reference, the government did not meet the statutory requirement of Section 2518(3)(c). In *Calhoun*, however, the court simply held that where the new affidavit did not even allege that normal investigation means would be ineffective, the statutory requirement was not met by the incorporation in it of a prior affidavit making that allegation as to a different interception at a different time. That defect is not present here. Agent Fekete's affidavit not only contained the required allegation, but it also contained additional facts showing the necessity for the interception (A. 81a-85a). The prior affidavit was properly incorporated to show additional facts supporting Fekete's allegations.

[10] As we have frequently noted in our filings in this Court (see, *e.g.*, *Berlin* v. *United States*, No. 77-548, cert. denied, 434 U.S. 1012 (1978); *Stone* v. *United States*, No. 77-690, cert. denied, 434 U.S. 1064 (1978)), the Ninth Circuit in *United States* v. *Kalustian*, 529 F.2d 585 (1975), appeared to require more specificity in supporting affidavits than has been required by other circuits. But *Kalustian* has not been accepted

5. Petitioners also contend (Pet. 22-25) that their monitored conversations should have been suppressed because the government failed to make the recordings available for judicial sealing "[i]mmediately upon the expiration of the * * * order" as required by 18 U.S.C. 2518(8)(a).

There was, however, no delay in sealing the tapes at issue here.[11] The interception of Pierorazio's telephone concluded at 8:00 p.m. on Friday, July 2, 1976 (A. 98a). Immediately following the three-day holiday weekend, the tapes were evidently prepared for judicial sealing on July 6, and the district judge sealed them on July 7 (A. 108a). Thus, only one work day, and less than five days in all, intervened between the expiration of the interception order and the sealing of the tapes.[12] This was substantial com-

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by any other circuit, or even consistently followed in the Ninth Circuit. In *United States* v. *Spagnuolo*, 549 F.2d 705 (9th Cir. 1977) that circuit retreated somewhat from the *Kalustian* standard, and it is not clear that the Ninth Circuit will continue occasionally to apply a more stringent standard than is utilized by the other circuits. In any event, this Court has declined numerous requests to review decisions alleged to be in conflict with *Kalustian*. See, *e.g.*, *Berlin* v. *United States*, *supra*; *Stone* v. *United States*, *supra*, and cases cited in our oppositions therein. Nothing has happened recently to justify any change in this refusal to review what is, at heart, an intra-circuit conflict of little continuing importance. Cf. *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

[11] No tapes made pursuant to the original authorization were presented at trial; therefore, there is no need to consider whether those tapes were promptly sealed.

[12] The district court, in denying petitioners' suppression motion, specifically ruled that "there is insufficient evidence to warrant a finding that the integrity of the tapes of the intercepted communications which the government seeks to have admitted has been violated or that the tapes have in any manner been tampered with or altered" (A. 158a). During the interval between the expiration of the intercept and judicial sealing, the tapes were carefully protected. They were initialed and heat sealed in evidence bags when removed from the recorder, then kept in a locked cabinet in Agent Fekete's office to which no other agent had access (A. 651a-657a).

pliance with Section 2518(8)(a). *United States* v. *Sklaroff*, 506 F.2d 837, 840-841 (5th Cir.). cert. denied, 423 U.S. 874 (1975) (14-day delay in sealing constitutes substantial compliance); *United States* v. *Canon*, 404 F. Supp. 841, 849 (N.D. Ala. 1975) (seven-day delay in sealing constitutes substantial compliance).[13]

6. Petitioners' final contention is that their convictions should be reversed because the prosecutor, in his opening statement, adverted to the testimony of a potential witness who he could not reasonably have expected to testify at trial (Pet. 26-29).

During his opening statement the prosecutor stated (Tr. 16):

> And it's also the Government's expectation that you will hear at least one of the participants in the telephone calls, other than Mr. Capps and Mr. Pierorazio, a person by the name of Rosemarie Schulz, testify as to her involvement in a particular telephone call with the defendant Frank Pierorazio.

Even though she was granted immunity, however,

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[13] In *United States* v. *Gigante*, 538 F.2d 502 (2d Cir. 1976), upon which petitioners rely, the court properly suppressed tapes where sealing delays ranged from 8 to 13 months.

Schulz refused to testify.[14] For this conduct she was held in contempt and jailed by the trial judge (Tr. 246-252).

Petitioners' argument that the prosecutor could not reasonably have expected Schulz to testify is refuted by the record. Schulz herself had pleaded guilty to distributing methamphetamine on May 3, 1976, and, in conjunction with a plea bargain in that case, had agreed to testify (and had testified) in a related probe of police corruption (Tr. 166-182). Indeed, in a meeting one month prior to trial, Schulz had informed the prosecutor that she would testify if granted immunity because she "wouldn't go to jail, even for one day, for somebody else" (G. Ex. 21; A. 793a). In light of this information and the grant of immunity, the prosecutor had every reason to believe that Schulz would, in fact, testify.

Moreover, it is well established that a new trial is not required whenever the prosecutor's opening remarks are not supported in every detail by evidence presented at trial. *Frazier* v. *Cupp*, 394 U.S. 731 (1969); *Mares* v. *United States*, 409 F.2d 1083, 1085 (10th Cir. 1968), cert. denied, 394 U.S. 963 (1969); cf. *United States* v. *Leftwich*, 461 F.2d 586, 590 (3d Cir.), cert. denied, 409 U.S. 915 (1972). Many things may happen during the course of a trial to prevent the presentation of all the expected evidence by the government. A witness's contumacious refusal to testify

[14] Schulz indicated that she was afraid to testify because of the possibility that she would suffer physical harm (Tr. 181-183).

is one of those things. But variances between the opening statement and the evidence actually introduced, like other improprieties of argument, do not require a new trial unless the discrepancies are "so gross as probably to prejudice the defendant and the prejudice has not been neutralized by the trial judge before submission of the case to the jury." *United States* v. *Leftwich*, *supra*, 461 F.2d at 590. The trial judge here properly instructed the jury that the case was to be decided on the evidence, which "does not include arguments or statements of counsel" (Tr. 679-681; see also Tr. 17).[15] See *Frazier* v. *Cupp*, *supra*, 394 U.S. at 736. Under these circumstances, the courts below properly refused to grant petitioners a new trial because of the brief reference by the prosecutor to Schulz's expected testimony.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[15] No request was made for a specific instruction to disregard the portion of the opening statement pertaining to Schulz's expected appearance.

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